Supreme Court, U.S.
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No. 99-49

IN THE

Supreme Court of the United States

THOMAS J. CLEARY, by his next friend, Carolyne Cleary; CAROLYNE CLEARY, individually, on their own behalf and on behalf of all other persons similarly situated,

Petitioners,

v.

WILLIAM WALDMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HUMAN SERVICES; LEONARD FISHMAN, in his official capacity as COMMISSIONER OF NEW JERSEY DEPARTMENT OF HEALTH AND SENIOR SERVICES;

(*Caption continued*)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING

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VELVET MILLER, in her official capacity as DIRECTOR OF DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES; MARK SCHIFFER, in his official capacity as DIRECTOR OF PASSAIC COUNTY BOARD OF SOCIAL SERVICES,

NEW JERSEY ASSOCIATION OF HEALTH CARE FACILITIES; NEW JERSEY ASSOCIATION OF NON-PROFIT HOMES FOR THE AGING, INC.,

Respondents.

QUESTION PRESENTED FOR REVIEW

Whether the District Court and the Court of Appeals correctly held that New Jersey's adoption of the "income first" method for determining medicaid eligibility, as expressly authorized by the United States Department of Health and Human Services, is permissible under 42 U.S.C. § 1396.

STATEMENT PURSUANT TO RULE 29.6

Respondent, New Jersey Association of Non-Profit Homes for the Aging ("NJANPHA"), is a not-for-profit corporation organized under the laws of the State of New Jersey. NJANPHA's members include approximately 130 non-profit and governmental long-term care and assisted living facilities which provide housing, health care and related services to elderly residents throughout New Jersey.

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SUMMARY OF ARGUMENT

The Petitioners fail to disclose the key fact that, in November 1998, this Court considered — and denied — a petition for a writ of certiorari to the Sixth Circuit on the precise legal issue raised here. While the Petitioners cite *Chambers v. Ohio Dep't of Human Services*, 145 F.3d 793 (6th Cir.), *cert. denied*, 119 S. Ct. 408 (1998), their citations carefully omit any reference to the case history in this Court. The Petitioners compound these misleading citations when, in their narrative discussion of *Chambers*, they again never mention this Court's denial of certiorari in that case. Unless we are to assume that these repeated failures are mere oversight, the only explanation is that the Petitioners are intentionally trying to hide the fact that this Court already passed on the question the Petitioners present for review.

The Petitioners have not shown any compelling reason why this Court should reverse course and grant certiorari now for a Third Circuit decision that is in complete agreement with the Sixth Circuit decision for which certiorari was denied just a few months ago.

There is no conflict among the United States Courts of Appeal. The Sixth Circuit and the Third Circuit are the only United States Courts of Appeal to address this issue. Both courts reached the very same conclusion. That conclusion is not in conflict with any decisions of this Court. Even more broadly, every standing federal or state court decision on this legal question uniformly agrees with the Third Circuit. There is absolutely no split of authority for this Court to resolve.

Equally important, the Third Circuit's unanimous decision is correct. The Medicare Catastrophic Coverage Act, 42 U.S.C. § 1396, *et seq.*, addresses the proper method for dividing a married couple's income and resources to determine Medicaid eligibility when only one spouse is in a health care facility. To provide limited financial protection to the community spouse, Congress authorized the allotment of income and resources between the spouses and the transfer of a portion of the institutionalized spouse's share, but only to the extent needed to maintain a minimum monthly income for the community spouse. This minimum income is a modest amount set by statute to enable the community spouse to live with dignity, but not in affluence.

Congress' concern in permitting any transfer of assets from the institutionalized spouse is to preserve the community spouse's minimum monthly income. The Petitioners nevertheless contend that 42 U.S.C. § 1396r-5 prohibits states from transferring the institutionalized spouse's income first and instead requires the transfer of resources. The transferred resources would then generate income that would raise the community spouse's total income to the minimum level. Under the Petitioners' incongruous view, the community spouse would thereby receive not only the minimum income intended by Congress, but also the windfall of substantial assets. Not surprisingly, Congress did not intend the MCCA as a tool to divert resources from the institutionalized spouse and accelerate his or her Medicaid eligibility.

As with the overall Medicaid Program, Congress intended the MCCA to set minimum conditions and benefits and allow each State the discretion to augment these benefits to the extent they chose. Congress did not limit States to

either an "income first" or a "resource first" method. States have the discretion to adopt either method. This discretion has been squarely confirmed by the interpretations and guidelines issued by the United States Department of Health and Human Services, the federal agency charged with administering the Medicaid Program. The Petitioners' principal argument — that Congress intended to impose a uniform, nationwide allocation method — is not properly before this Court because it was not raised or considered below. Even more, that new-found argument is wrong. New Jersey's adoption of the "income first" method is consistent with federal law.

REASONS FOR DENYING THE WRIT

I.

THIS COURT RECENTLY DENIED CERTIORARI ON THE QUESTION PRESENTED.

Just a few months ago, in November 1998, this Court denied a petition for a writ of certiorari to the Sixth Circuit on the precise legal issue raised here. In *Chambers v. Ohio Dep't of Human Services*, 145 F.3d 793 (6th Cir.), *cert. denied*, 119 S. Ct. 408 (1998), the Court of Appeals held that Ohio's decision to apply the income-first approach was reasonable and permissible under the MCCA. *Chambers*, 145 F.3d at 804. *Chambers* is critical to the Petitioners' application because it is the only United States Court of Appeals decision, other than the Third Circuit decision at issue here, ever to address the question presented for review.

Despite this significance, in their citations to *Chambers*, the Petitioners carefully omit any reference to the case history

in this Court. This lack of candor is repeated when, in the Petitioners' substantive discussion of *Chambers*, they again fail to mention that certiorari was sought and denied in that case. By hiding this Court's disposition of *Chambers*, the Petitioners presumably hope to avoid having to explain why the Court should reverse course and now grant certiorari on the very same issue decided the very same way. Not surprisingly, the Petitioners offer no reason whatsoever for this Court to change its mind. There is no reason. The petition for a writ of certiorari should be denied.

II.

THE DECISION BELOW DOES NOT CONFLICT WITH ANY STANDING FEDERAL OR STATE COURT DECISION.

There is no conflict among the United States Courts of Appeal for this Court to resolve. Both the Sixth Circuit and the Third Circuit — the only United States Courts of Appeal to have addressed this issue — concluded that the States have the discretion under the MCCA to adopt the income-first method for allocating assets to the community spouse. Not surprisingly, the Petitioners do not even pretend that there is any such split of authority among the Courts of Appeals warranting review by this Court.

The Petitioners instead try to contrive a conflict in the lower courts by citing federal and state court cases that were later reversed or overruled. The Petitioners cite the District of Ohio decision in *Chambers* that was reversed by the Sixth Circuit and has no precedential effect. (Pet. 8). The Petitioners likewise cite *Hurly v. Houston*, No. 93-3666 (E.D. Pa. July 1, 1996), a District Court decision that never

ruled directly or in dicta on the legal question at issue. The Petitions cite *Golf v. New York Dep't of Social Services*, 88 N.Y.2d 960, 634 N.Y.S.2d 581 (A.D. 4th Dept. 1995), *rev'd*, 91 N.Y.2d 656 (1998), a New York intermediate court decision that was reversed by its highest court. Finally, the Petitioners cite *Comis v. Bullen*, No 94-4513 (Mass Sup. Ct. Jan. 31, 1996), a Massachusetts trial court decision that was overruled by its highest court in *Thomas v. Comm'r of the Div. of Medical Assistance*, 425 Mass. 738, 682 N.E.2d 874 (1997). While the Petitioners understandably prefer to blur the focus of their petition by referencing obsolete case law, the fact remains that there is not a single standing federal or state court decision in conflict with the Third Circuit decision at issue.

The Petitioners similarly try to create the false impression that there is nationwide confusion about the propriety of the income-first method. For this misplaced purpose, the Petitioners cite policy statements of the Health Care Finance Administration ("HCFA"), the part of the United States Department of Human Services charged with the administration of the Medicaid Program. However, HCFA has never once suggested that States could not adopt the income-first method. To the contrary, HCFA has consistently stated that the income-first method is a permissible, if not the preferable, application of the MCCA. HCFA's directive on the topic is unambiguous:

> States have the option to use the income first rule or to apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue.

(Memorandum from Medicaid Bureau Director Sally Richardson (March 4, 1994)). The Petitioners cannot seriously suggest that this clear and long-standing statement evidences any confusion as to propriety of the income-first method.

Nor do the Petitioners show any confusion by referencing the approaches of various State legislatures. That some States have adopted the resource-first method, or are considering doing so, while others have adopted the income-first method, merely shows that the States are freely exercising the discretion Congress intended and HCFA confirmed. It does not mean that States are confused as to how to implement the MCCA.

There is no reason to consider the merits of this issue now. There is no evidence of any disagreement among the courts, HCFA, or the States as to the discretion given each State to adopt the income-first approach. Further percolation in the lower courts either will confirm the current consensus that "income first" is a permissible method for allocating assets or will create the kind of substantive and reasoned split of authority that warrants this Court's review.

III.

THE THIRD CIRCUIT CORRECTLY INTERPRETED THE MEDICAID LAWS.

A. The Petitioner's "Uniformity" Argument Is Not Properly Before This Court Because It Was Not Raised in or Considered by the Court of Appeals

The Petitioners filed lengthy briefs in the Third Circuit in which they raised and argued many issues. Yet they never argued on appeal that Congress intended to impose on the States a single uniform method for allocating additional assets to the community spouse. This is nonetheless the Petitioners' principal argument in this Court. (Pet. 7). Indeed, the Petitioners devote a full third of their brief to showing that some States have approved a resource-first method while others have approved an income-first method. The Petitioners cannot raise this argument for the first time now.

This Court repeatedly has made clear that it will not consider on a writ of certiorari an argument not raised below. *See, e.g., Auer v. Robbins*, 519 U.S. 452 (1997); *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392 (1996). The Court looks for a fully developed record, including the guidance of the Court of Appeals, on all issues that it addresses. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 n.23 (1989). By failing to raise this specific argument on appeal, the Petitioners have deprived this Court of the Third Circuit's analysis and views on that issue.

While this Court has the power to deviate from its general rule, "[i]t is only in exceptional cases coming [to this Court] from the federal courts that questions not pressed or passed

upon below are reviewed." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)). This is surely not such an exceptional case. Indeed, the Petitioners have not even attempted to justify their failure to raise the "uniformity" argument in the Court of Appeals. This previously unasserted argument "is so obviously an afterthought" as not to warrant consideration by this Court. *See Miree v. DeKalb County, Georgia*, 433 U.S. 25, 33-34 (1977).

B. Congress Did Not Intend to Preclude the States from Adopting the Income-First Method

There is no mystery as to the purpose of the Medicaid Program, 42 U.S.C. § 1396, *et seq*. Congress enacted Medicaid as a cooperative federal-state effort to "provide federal financial assistance to states that choose to reimburse certain costs of medical treatment *for needy persons*." *Harris v McRae*, 448 U.S. 297, 301 (1980) (emphasis added). Medicaid is a means-tested welfare program. Benefits are available only to persons whose own income and resources are insufficient to meet the cost of necessary medical care. 42 U.S.C. § 1396. In short, Medicaid "requires that an elderly or disabled nursing home resident be poor in order to qualify for coverage." H.R. Rep. No. 105(II), 100th Cong., 2d Sess. 65-68 (1988), *reprinted in* 1988 U.S.C.C.A.N. 803, at 888.

The Medicare Catastrophic Coverage Act, 42 U.S.C. § 1396r-5 ("MCCA"), did not overturn this purpose. Congress enacted the MCCA in 1988 in part to soften the financial impact of the prior law on individuals whose spouses reside in nursing homes or other facilities and receive Medicaid benefits. *Ford v. Iowa Dep't of Human Services*, 500 N.W.2d 26, 27 (Iowa 1993). Under the prior law, nearly

all of a couple's assets had to be depleted before either one could satisfy Medicaid eligibility requirements, impoverishing the spouse who remained in the community. House Rep., at 888-92. The MCCA revised the rules regarding the attribution and transfer of both income and resources between spouses to prevent the total pauperization of the community spouse. *Id.* at 888. Congress' intent was simply to assure that the community spouse have "a sufficient — but not excessive — amount of income and resources available [while the institutionalized spouse] is in a nursing home at Medicaid expense." *Id.* at 888. In essence, the MCCA attempted to strike a careful balance between protecting the community spouse from total impoverishment, and protecting the limited resources of the Medicaid Program needed for our aging population. *Chambers*, 145 F.3d at 797.

The MCCA was not meant as a tool to shelter wealth. Congress was properly concerned that — as part of a welfare program — Medicaid eligibility standards should not "facilitate the transfer of accumulated wealth from nursing home patients to their nondependent children." House Rep., at 896. The Medicaid Program also

> recogniz[es] the marital relationship for what it is, a relationship of interdependence wherein it is neither unfair nor unrealistic to require one spouse to support the other, in particular to help meet the obligation to pay for family medical bills.

Cherry by Cherry v. Sullivan, 30 F.3d 73, 75 (7th Cir. 1994). To prevent the transfer of an excessive amount of income and resources away from the institutionalized spouse, Congress defined a specific "minimum monthly maintenance needs allowance" ("MMMNA") for the community spouse.

This minimum income is set by statute at modest amount to enable the community spouse to live with dignity, but not in affluence.

This is the key language at issue:

> If any such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance.

42 U.S.C. § 1396r-5(e)(2)(C). The question is whether "the community spouse's income" includes — or does not include — any transfer of income from the institutionalized spouse. The "community spouse's income" can encompass several things. In fact, the statute broadly contemplates the allocation of income to the community spouse from a variety of sources, including: the income paid directly to the community spouse, the income generated by the "community spouse resource allowance" (created by Section (f)(2)), and the "community spouse monthly income allowance" (created by Section (d)(2)). Importantly, Congress defined the amount of the "community spouse monthly income allowance" as that amount of income needed to raise the income otherwise available to the community spouses up to the MMMNA. 42 U.S.C. § 1396(d)(2). All of these sources constitute "the community spouse's income." Given Congress' narrow purpose, the most sensible interpretation of "the community

spouse's income" encompasses all income which the community spouse will receive from all sources while the institutionalized spouse is receiving Medicaid — including the "community spouse monthly income allowance." What the statutory language and scheme demonstrate is that Congress' principal concern was assuring the community spouse's minimum monthly *income,* not encouraging the transfer of the institutionalized spouse's resources and thereby accelerating Medicaid eligibility.

Any ambiguity in the statute has been resolved by HCFA. Congress vested broad discretion with the United States Department of Health and Human Services — the agency charged with implementing the Act — to interpret and "define the eligibility requirement for Medicaid." *Herweg v. Ray*, 455 U.S. 265, 274 (1982). The Department, through HCFA, has repeatedly interpreted the Act as permitting states to use an "income first" method to raise the community spouse's income to the MMMNA.

HCFA's guidelines clearly reflect approval of "income first" as a permissible allocation method under the MCCA. The *State Medicaid Manual*, HCFA-Pub. 45-3, § 3260, Transmittal No. 39 (Oct. 1989), issued by the Health Care Financing Administration shortly after Congress enacted the Medicare Catastrophic Coverage Act, provides guidelines for the states to follow regarding income and resource determinations for institutionalized individuals who have a community spouse. This is what the *State Medicaid Manual* initially directed:

> For an individual with only a spouse at home, *a state must deduct from the individual's total income an amount for the maintenance needs of*

> *the spouse*. The state must base this amount on a reasonable assessment of the needs of the spouse which includes consideration of the spouse's income and resources. The amount deducted for the needs of the spouse must be reduced dollar for dollar for each dollar of the noninstitutionalized spouse's own income.

State Medicaid Manual, HCFA Pub. 45-3, § 3703.4, Transmittal No. 32 (Feb. 1988) (emphasis added). HCFA later provided a more direct interpretation:

> [W]e are requiring that the institutionalized spouse must first make available the maximum amount of income he or she can as a community spouse monthly income allowance under [42 U.S.C. § 1396r-5](d)(1)(B) before being allowed to raise the [CSRA] under section [42 U.S.C. § 1396r-5](e)(2)(C). The state would have the discretion to determine the maximum amount of income that the institutionalized spouse can afford to protect for the community spouse.

HCFA Chicago Regional State Letter No. 51-93 (Dec. 1993). HCFA later further modified its directive to allow the States more flexibility:

> We would now like to clarify that States have the option to use the "income first" rule or apply some other reasonable interpretation of the law until we have issued final regulations which specifically address this issue.

HCFA Chicago Regional State Letter No. 22-94 (Jul. 1994). HCFA has never interpreted 42 U.S.C. § 1396r-5(e)(2)(C)

as precluding the income-first method. To the contrary, HCFA has unambiguously interpreted the MCCA as permitting states to adopt the "income first" method followed by New Jersey.

This agency interpretation is entitled to substantial deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). "[T]he question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* The agency's construction of an ambiguous statute may not be disturbed if it reflects a reasonable construction of the statute and does not otherwise conflict with Congress' expressed intent. *Rust v. Sullivan*, 500 U.S. 173, 174 (1991).

There is nothing about the language or purpose of the MCCA that suggests that Congress intended to impose a single, nationwide allocation method. The Petitioner rests their argument on the slenderest foundation — a single phrase taken out of context from a House Report on a version of the bill never enacted. The reference in the House bill to establishing "a uniform national spousal protection policy that applies in all States. . . ." (Pet. 7), alludes to the overall policy of protecting the community spouse with a minimum income, not to the precise method for allocating income or resources to achieve this minimum income.

Equally important, the Conference Committee adopted neither the House nor the Senate versions of the bill. *See* H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. at 265 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 1035-47. Unlike the House version, the version adopted by the Conference Committee provided for the adjustment to the community spouse resource allowance if necessary to increase the

community spouse's income to meet the minimum monthly needs allowance. But, unlike the Senate version, the Conference version did not achieve the result through the reallocation of resources. The Conference version instead provided for a fair hearing process in subsection (e)(2), which permits reconsideration of any one of five components of the community spouse's income in subsection (e)(2)(A) and allows a revision of the community spouse resource allowance in subsection (e)(2)(C). The Conference Committee specifically chose not to adopt the resource-first approach as proposed by the Senate. There is no basis for the Petitioners' argument that Congress imposed either resource-first or income-first as the sole method for the States to use.

States have the discretion to adopt either method. This discretion in consistent with the language, legislative history, and purpose of the MCCA and the Medicaid Program. It does not undermine any uniformity intended by Congress. Moreover, this discretion has been squarely confirmed by the interpretations and guidelines issued by the United States Department of Health and Human Services, the federal agency charged with administering the Medicaid program.

As the Third Circuit correctly held, New Jersey's decision to transfer "income first" in implementing the MCCA is wholly consistent with federal law.

CONCLUSION

For these reasons, the New Jersey Association of Non-Profit Homes for the Aging requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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